IN THE UNITED STATES COURT FOR THE DISTRICT OF UTAH

CENTRAL DIVISION

VOLVO COMMERCIAL FINANCE, LLC THE AMERICAS,

Plaintiff,

vs.

ERIC C. JACKSON, et al,

Defendants.

ERIC C. JACKSON, et al.,

Counterclaim Plaintiffs,

vs.

VOLVO COMMERCIAL FINANCE, LLC THE AMERICAS and VOLVO TRUCKS NORTH AMERICA, INC.,

Counterclaim Defendants.

VOLVO COMMERCIAL FINANCE, LLC THE AMERICAS,

Plaintiffs,

vs.

GREAT BASIN COMPANIES, INC., et al.

Defendants.

OPINION AND ORDER GRANTING SUMMARY JUDGMENT ON STANDING AND DISMISSING COUNTERCLAIMS

Case No. 2:02-CV-00027 PGC

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This case is before the court on counterclaim defendant Volvo Trucks North America, Inc.'s ("VTNA") Motion for Summary Judgment Re: Standing (#290-1). Plaintiffs Eric C. Jackson and Great Basin Companies, Inc. ("Great Basin") oppose the motion. Having heard oral argument and reviewed the pleadings and the relevant law, the court now GRANTS summary judgment in VTNA's favor and dismisses counts II, III, IV, VII, and XII of Jackson and Great Basin's Amended Counterclaim, as explained below.

BACKGROUND

The history of this case is lengthy and has been set forth in some detail in the court's prior orders. In brief, this litigation began when Volvo Commercial Finance ("VCF") filed suit against Jackson, Great Basin, and related parties over an alleged breach of a $1.3 million loan agreement. In response to VCF's Amended Complaint, several defendants, including Jackson and Great Basin, filed an Amended Answer, Defenses & Counterclaim (#204-1) on March 10, 2003 (the "Counterclaim"). Counts I through XII of the Counterclaim set forth claims against Volvo Commercial Finance, LLC ("VCF") and Volvo Trucks of North America ("VTNA") based on allegations of illegal conduct surrounding the $1.3 million loan and other wrongful acts. On May 23, 2003, VCF moved to dismiss several counts of the Counterclaim and VTNA moved to dismiss counts II, III, IV, V, VII, and IX of the Counterclaim – all counts implicating VTNA.

At a hearing on July 28, 2003, the court dismissed Count V of the Counterclaim with prejudice, as well as "the corresponding allegations and claims under Count VII" while allowing the remaining counts in the Counterclaim to go forward.[1] VTNA then moved for summary judgment on Counts II, III, IV, VII, and XII, based on Jackson and Great Basin's alleged lack of

[1] Order Regarding July 28, 2003 Hearing, at 3, no. 3.

standing to pursue its remaining claims against VTNA. At a hearing on January 23, 2004, the court heard oral argument, dismissed VCF's motions for summary judgment and took VTNA's motion for summary judgment under advisement.

ANALYSIS

Summary judgment is appropriate when there is "no genuine issue of any material fact and the moving party is entitled to judgment as a matter of law."[2] In deciding a motion for summary judgment, this court reviews all the evidence in the record, construing it and drawing all inferences therefrom most favorably to the non-moving party.[3] "In a response to a motion for summary judgment, a party cannot rely on ignorance of facts, on speculation, or on suspicion, and may not escape summary judgment on the mere hope that something will turn up at trial."[4]

In this case, VTNA's Memorandum in Support of its Motion for Summary Judgment Re: Standing sets forth 14 numbered fact paragraphs which Jackson and Great Basin fail to dispute in their opposition memorandum, as provided by the local rules:

> A memorandum in opposition to a motion for summary judgment must begin with a section that contains a concise statement of material facts as to which the party contends a genuine issue exists. Each fact in dispute must be numbered, must refer with particularity to those portions of the movant's fact that is disputed. *All material facts of record meeting the requirements of Fed. R. Civ. P. 56 that are set forth with particularity in the statement of the movant will be deemed admitted for the purpose of summary judgment, unless specifically controverted by the statement of the opposing party* identifying material facts of record meeting the

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[2] Fed. R. Civ. P. 56(c)

[3] *See Guides, Ltd. v. Yarmouth Group Property Management, Inc.*, 295 F.3d 1065 (10th Cir. 2002) (citations omitted).

[4] *Conaway v. Smith*, 853 F.2d 789, 794 (10th Cir. 1988).

requirements of Fed. R. Civ. P. 56.[5]

At oral argument, counsel for Jackson and Great Basin recognized the failure to dispute the facts, but stated, "I've looked at them, after they pointed out my error in the reply brief . . . . I wouldn't have denied or disputed them anyway, Your Honor. I can't dispute any of them, they come right out of the record."[6] Accordingly, the court treats deems the facts set forth in VTNA's supporting memorandum as admitted and undisputed.

Article III Standing

There are three elements which must be present in order for a claimant to have standing under Article III of the United States Constitution: "First, the plaintiffs must suffer an injury-in-fact [which is] concrete and particularized and actual or imminent, i.e., not conjectural or hypothetical. Second, the injury must be 'fairly traceable to the challenged action of the defendant,' rather than some third party not before the court. Third, it must be likely that a favorable court decision will redress the injury of the plaintiff."[7] "Beyond the constitutional requirements, a plaintiff . . . must assert his or her own legal rights."[8]

The burden to establish standing rests on the party invoking federal jurisdiction.[9] In this case, Jackson and Great Basin have the burden to establish their standing to assert Counts II, III,

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[5] DUCivR 56(c).

[6] January 23, 2004 H'rg Tr., at 12-13.

[7] *Essence, Inc. v. City of Federal Heights*, 285 F.3d 1272, 1280 (10th Cir. 2002) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992)) (additional citations, numbering, and brackets omitted).

[8] *Mount Evans, Co. v. Madigan*, 14 F.3d 1444, 1450 (10th Cir. 1994).

[9] *See Essence*, 285 F.3d at 1280.

IV, VII, and XII of the Counterclaim. In defending the summary judgment challenge to standing, Jackson & Great Basin "must establish that there exists no genuine issue of material fact as to justiciability . . . mere allegations of injury, causation, and redressability are insufficient."[10]

In this case, VTNA argues that Jackson and Great Basin cannot pursue their claims against VTNA because neither party has "personally suffered an injury in fact."[11] Jackson alleges claims against VTNA of fraud, promissory estoppel, and negligent misrepresentation, while Great Basin alleges one claim of promissory estoppel.

Jackson's Claims (Counts II, III, and XII)

Jackson's claims are based on allegations that he lost $500,000 which he was induced to invest into Great Basin Trucks of Nebraska, Inc. ("Great Basin Nebraska") based on false statements made by VTNA officers. The Counterclaim sets forth the $500,000 figure; however, the evidence in the record indicates Jackson invested only *$400,000.* Jackson's response memorandum coyly states that he "personally lost at least his $400,000 investment."[12] Yet, neither Jackson nor his counsel has produced documents or otherwise explained the additional $100,000 claimed in the Counterclaim. Accordingly, the court will proceed on the basis that $400,000 is at issue.

VTNA argues that Jackson has suffered no injury in fact because there is no evidence that he lost any of his investment. The court agrees. The record shows that instead of losing his

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[10] *See Id.*

[11] *Madigan*, 14 F.3d at 1450.

[12] Jackson and Great Basin Memorandum in Opposition to VTNA's Motion for Summary Judgment Re: Standing, at 4.

investment, Jackson made a substantial gain when he purchased Great Basin Nebraska's stock for $400,000 and subsequently exchanged two-thirds of his stock shares for $1 million in cash and the remaining one-third for stock in Great Basin Companies.

The undisputed facts demonstrate that In January 1998, Jackson owned all outstanding shares of Great Basin Nebraska's stock.[13] He then arranged to transfer one-third of the shares to Jeffrey Stone and one-third of the shares to Seldon Young, in exchange for $500,000 from each.[14] In other words, Jackson purchased all of Great Basin Nebraska's stock for $400,000 and re-sold two-thirds of it for $1 million. Jackson received a net profit in that transaction of $600,000. In addition, he retained one-third of the Great Basin Nebraska shares he originally purchased and eventually exchanged them for shares of stock in Great Basin Companies.[15] Under these circumstances, it would be absurd to consider Jackson's $400,000 investment in Great Basin Nebraska stock "lost" because Jackson received bargained-for consideration for the stock which exceeded $1 million. As a result, there is no basis for the court to conclude that Jackson's $400,000 investment in Great Basin Nebraska stock led to any "injury in fact" as required to establish Article III standing. Accordingly, Counts II, III, and XII are dismissed with prejudice.

As an alternative basis for dismissal, VTNA argues that Jackson's claims are derivative claims belonging to Great Basin Nebraska, not to Jackson personally. To be sure, under certain circumstances Utah law allows individual shareholders to proceed directly for injuries to the

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[13] *See* VTNA's Statement of Undisputed Material Facts, ¶ 9.

[14] *See id.*, ¶ 10.

[15] *See id.*, ¶¶ 11-12.

corporation.[16] However, the court need not reach the issue of whether Jackson's claims are direct or derivative because Jackson has failed to show the injury in fact required for standing purposes.

Great Basin's Promissory Estoppel Claim (Count IV)

Great Basin claims that due to promises by VTNA officers that VTNA would soon purchase the stock of Great Basin Nebraska, Great Basin Companies "continued to pour money into the dealership" when it otherwise "would have closed or sold the Nebraska dealership in July of 2000."[17] However, there is no evidence that Great Basin Companies "continued to pour money" into Great Basin Nebraska. Such lack of evidence casts serious doubt as to whether Great Basin suffered the requisite injury in fact for standing purposes. Even assuming the existence of an injury in fact, such injury would not be traceable to the actions of VTNA.

The promissory estoppel claim in Count IV depends entirely on the alleged promises by VTNA and its officers to purchase Great Basin Nebraska stock. But, the undisputed facts demonstrate that Great Basin did not even own stock in Great Basin Nebraska until June 30, 2000, and that there was *never* a discussion between VTNA and Great Basin Nebraska or Great Basin regarding the purchase of Great Basin Nebraska's stock.[18] Great Basin's response to the motion for summary judgment fails to properly set forth any facts or law which would allow the court to trace any injury described in Count IV of the Counterclaim to the actions of VTNA. As

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[16] *See Aurora Credit Svc. v. Liberty West Dev. Inc.*, 970 P.2d 1273, 1280 (Utah 1998); *see generally,* Peter H. Donaldson, Comment, *Breathing Life Into* Aurora Credit Services Inc., v. Liberty West Development, Inc.: *Utah's Close Corporation Exception to the Derivative Lawsuit Requirement and the Case for Strong Fiduciary Duties in Closely Held Corporations*, 2002 UTAH L. REV. 519.

[17] Amended Answer, Defenses & Counterclaim, ¶¶ 70-72.

[18] *See* VTNA's Statement of Undisputed Material Facts, ¶¶ 12-13.

a result, summary judgment on standing grounds is proper, and Count IV of the Counterclaim is dismissed with prejudice.

The Civil Conspiracy Claim (XII)

Jackson and Great Basin's claim for civil conspiracy, depends entirely on the existence of an underlying tort claim.[19] Because Jackson and Great Basin's tort claims have all been dismissed by the court, dismissal of their civil conspiracy claim is also appropriate. Accordingly, Count XII of the Counterclaim is dismissed without prejudice.

CONCLUSION

Based on the foregoing, the court GRANTS Volvo Trucks North America, Inc.'s Motion for Summary Judgment Re: Standing (# 290-1). Counts II, III, IV, and XII of the Amended Answer, Defenses & Counterclaim (#204-1) are DISMISSED with prejudice. Count VII of the counterclaim is DISMISSED without prejudice as to Volvo Trucks North America, Inc.

SO ORDERED.

DATED this 10th day of March, 2004.

BY THE COURT:

Paul G. Cassell
United States District Judge

[19] *See Israel Pagan Estate v. Cannon*, 746 P.2d 785, 794 (Utah App. 1987).

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United States District Court
for the
District of Utah
March 12, 2004

* * CERTIFICATE OF SERVICE OF CLERK * *

Re: 2:02-cv-00027

True and correct copies of the attached were either mailed, faxed or e-mailed by the clerk to the following:

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